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ON THE TRANSFER OF TECHNOLOGY

FURTHER CONSULTATIONS ON A DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY

Report of the Secretary-General of UNCTAD

Note by the UNCTAD secretariat

Attached is the report by the Secretary-General of UNCTAD on the above subject, as submitted to the General Assembly at its forty-sixth session.

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DEVELOPMENT AND INTERNATIONAL ECONOMIC COOPERATION: TRADE AND DEVELOPMENT

International code of conduct on the transfer of technology

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Secretary-General of the United Nations Conference on Trade and Development on the outcome of consultations on the draft international code of conduct on the transfer of technology, as requested in paragraph 3 of its resolution 45/204 of 21 December 1990.

ANNEX

Report of the Secretary-General of the United Nations Conference on Trade and Development on the consultations on the draft international code of conduct on the transfer of technology

I. INTRODUCTION

1. The background to the negotiations on an international code of conduct on the transfer of technology, as well as the consultations carried out by the Secretary-General of UNCTAD and the President of the United Nations Conference on an International Code of Conduct on the Transfer of Technology since the last session of the Conference in 1985 have been amply explained in previous reports of the Secretary-General of UNCTAD to the General Assembly (see A/45/588). Suffice it to recall that the General Assembly, in its resolution 45/204 of 21 December 1990, invited "the Secretary-General of the United Nations Conference on Trade and Development and the President of the United Nations Conference on an International Code of Conduct on the Transfer of Technology to carry out further in-depth consultations with regional groups and Governments on the draft code of conduct, in conjunction with the appropriate intergovernmental bodies of the United Nations Conference on Trade and Development, in early 1991". In pursuance of the above-mentioned resolution, consultations were held from 23 to 30 April 1991 in conjunction with the eighth session of the UNCTAD Committee on Transfer of Technology. The present report gives an account of those consultations and, in the light of their outcome, puts forward some suggestions with respect to future action on the draft international code of conduct on the transfer of technology.

II. REPORT ON THE CONSULTATIONS

2. The consultations carried out in 1991 had some special features that distinguished them from previous ones (held from 1986 to 1990). First, they were based on a preparatory process undertaken by the UNCTAD secretariat which consisted of: (a) the preparation by the secretariat of a study on recent developments in the area of technology and their relevance to the code negotiations; a/ (b) a report by experts invited by the Secretary-General of UNCTAD in their personal capacity to make concrete suggestions on future action on the code; b/ (c) bilateral consultations with various delegations. In light of this preparatory process, participants were fully apprised of the scope and objective of the consultations. This enabled them to focus exclusively on ideas and suggestions in respect of further action on the code negotiations. Secondly, the consultations were very well attended and almost all the member States of the UNCTAD Committee on Transfer of Technology participated actively in the discussions. Thirdly, a positive atmosphere reigned throughout the consultations and a political will to achieve concrete results was shown by all delegations, including those which, in previous consultations, had expressed reservations on the merits of resuming negotiations on the draft code. Indeed, for the first time since the last

session of the Conference in 1985, there was general agreement to relaunch the negotiating process on the basis of a "fresh approach" to the concept of a code. To this end, it was agreed, in principle, that an intergovernmental group of experts could be established in UNCTAD with clear terms of reference on the task to be accomplished so as to prepare the ground for the resumption of negotiations. Thus, most of the discussions were devoted to the consideration of the terms of reference of the intergovernmental group of experts. The main differences among regional groups and Governments concerned the formulation of the terms of reference.

3. The discussions on the terms of reference showed, on the one hand, that all Governments were conscious of the need for a fresh approach to the draft code, in the light of important changes that had occurred in the area of technology policies during the past decade. They also revealed, on the other hand, that the approaches of Governments to resolving certain issues which are central to the draft code of conduct (e.g. the treatment of restrictive practices in transfer of technology transactions and the question of choice of law) continued to differ. It should, however, be stressed that during the consultations, substantial progress was made on the clarification of the respective positions of Governments on these issues. Even more important was the broad agreement reached on a "fresh approach" to the concept of a code.

4. As shown in the annex, the draft text under consideration at the end of the consultations divided the terms of reference into two main parts. Paragraph 1 refers to a fresh approach to the concept of a code and the need for an intergovernmental group of experts:

> "to review economic, technological and policy trends relevant to technology acquisition and transfer; and
>
> to formulate appropriate recommendations for consideration of a framework of principles and standards in the area of transfer of technology with a view to furthering economic development of all countries, in particular developing countries, taking fully into account recent policy shifts towards promotion of technology transfer and new emphasis on co-operation; this could be manifested by more specific promotional guidelines for intergovernmental and inter-enterprise co-operation on, inter alia, collaborative research and development schemes or programmes, joint ventures, and the promotion of technology transfer related investment and innovation in developing countries, including in new and emerging technologies;
>
> consider to what extent a code should reflect the desirability of an open environment for the import and export of technology."

5. There was general agreement on the formulation of this part of the text. The main differences concerned the second paragraph (see annex) which refers more specifically to some of the issues outstanding in the draft code of conduct itself, and in particular the evaluation of restrictive practices (chap. 4 of the draft code) and choice of law (chap. 9 of the draft code). It

is the manner in which these issues should be treated and the appropriate solutions for them that still causes a divergence of approaches among regional groups and Governments.

6. According to one approach, advocated mainly by some developing countries, the terms of reference should consist only of broad guidelines indicating to the proposed intergovernmental group of experts the overall approach it should adopt in the formulation of recommendations on the draft code. Although these countries agreed to refer to the principles of competition law and freedom of choice of law in the draft code of conduct, they argued that the intergovernmental group of experts should enjoy some leeway as to the exact application of those principles.

7. According to another approach, advocated mainly by developed countries, the broad guidelines were acceptable as regards the "fresh approach" to the code negotiations as a whole, but clear and precise guidance should be given to the intergovernmental group of experts with respect to the two major outstanding issues in the draft code, i.e., the evaluation of restrictive practices and applicable law. These countries insisted therefore upon the exclusive application of competition law principles to the evaluation of restrictive practices (chap. 4 of the draft code) and adherence to freedom of contract and freedom of choice of law with respect to applicable law and forum for dispute settlement (chap. 9 of the draft code). (See para. 2 of the annex for the exact wording proposed by these countries.)

8. The Union of Soviet Socialist Republics and the Czech and Slovak Federative Republic stated that they could go along with either approach and emphasized the paramount importance for their Governments of restarting the process of negotiations on the draft code. The representative of the People's Republic of China equally emphasized the need to convene an intergovernmental group of experts to prepare the ground for the resumption of negotiations, and stressed the flexibility of the Chinese delegation with respect to the terms of reference, although their preference was for the approach advocated by the developing countries.

9. A number of compromise formulae were suggested in an attempt to breach the impasse on the terms of reference. However, both Group B and the Group of 77 proposed some drafting changes which essentially reaffirmed their above-described positions. Thus, the main problem was the extent to which the consultations should define the nature of the solutions to be adopted by the intergovernmental group of experts for these two unresolved issues in the draft code, namely the evaluation of restrictive practices and freedom of choice of law. Group B countries argued that since the code negotiations had failed in the past owing to lack of agreement on those two issues, there was no point in restarting them unless precise criteria for solutions were agreed upon by the consultations. For the member countries of the Group of 77, the mere acceptance of the eventual inclusion of the principles of competition law and freedom of contract in the draft code constituted a major concession by their Group. Thus, in their view, the definition at this stage of the precise criteria to be applied by the intergovernmental group of experts would only

preempt the recommendations to be formulated by the Group itself. Some developing countries also expressed reservations about the usefulness of a code of conduct which would incorporate standards based on the exclusive application of competition law to the evaluation of restrictive licensing practices (chap. 4) without due regard to their effects on development, and on adherence to freedom of contract and freedom of choice of law in respect of applicable law.

III. CONCLUSIONS AND SUGGESTIONS FOR FURTHER ACTION

10. In spite of the failure to reach full agreement on the terms of reference of the intergovernmental group of experts, these consultations were the most intensive and cooperative that have been held since suspension of the code negotiations in 1985. For the first time there was general agreement, in principle, on the need to resume negotiations on the draft code of conduct on the basis of a "fresh approach". This was partly brought about by the suggestions and recommendations made by the secretariat in its study on "The relevance of recent developments in the area of technology to the negotiations on the draft international code of conduct on the transfer of technology" a/ and in the report of the experts invited by the Secretary-General of UNCTAD. b/ The ideas advanced in these documents and in bilateral consultations relating to a "fresh approach" to the negotiations on the draft code of conduct seem to have been very well received by all delegations. They reignited interest in the whole process and offered a new prospect for exploring further avenues of action on the elaboration of a code of conduct.

11. Although this preparatory work was necessary and helpful, it was clearly not sufficient to secure a positive outcome. The basic divergences on the treatment of restrictive practices in transfer of technology transactions and on the choice of law persist and undoubtedly constitute the main obstacle to the possible resumption and eventual conclusion of the negotiations on a code.

12. It is evident that the differences on the formulation of the terms of reference reflect a more deep-seated divergence of views on these issues. Thus, a clear understanding among Governments on the appropriate manner of dealing with them would be required for the success of any further work on the negotiations on a code of conduct.

13. It is also quite clear that, as time passes, the prospects for agreement may become dimmer unless the favourable momentum created at these consultations can be sustained and possibly concretized in an agreement on the terms of reference for an intergovernmental group of experts to draw up recommendations on a fresh approach to the concept of a code.

14. As was emphasized by the Group of Experts invited in their personal capacity by the Secretary-General of UNCTAD in September 1990, "recent economic, technological and policy developments, in the international arena, have rendered even more relevant concerted international action on the creation of a global framework of norms and standards for the transfer of

technology". 2/ However, if the draft international code of conduct is to serve as the basis of such a global framework, it will be necessary to take into account not only the basic concerns which inspired the structure, contents and coverage of the draft code almost two decades ago, but also the needs, concerns and policy approaches which have emerged in recent years in the area of international economic and technological relations. Hence, the need for an intergovernmental group of experts, with clear-cut terms of reference, to review the entire process in the light of economic, technological and policy trends relevant to technology acquisition and transfer and to make the necessary recommendations to Governments on the future of the negotiations.

15. In light of the above, the following options may be considered by Governments in deciding on further action with respect to negotiations on the draft code of conduct:

(a) A decision by the General Assembly to convene the proposed intergovernmental group of experts on the basis of the attached draft terms of reference whose formulation could be completed through informal consultations at the current session of the General Assembly. As may be seen in the appendix, differences persist solely with respect to the bracketed words in paragraph 2 of the text;

(b) A decision by the General Assembly, recognizing the need to review the entire process in the light of recent economic, technological and policy trends relevant to technology acquisition and transfer, to refer the whole matter, including the completion of the formulation of the terms of reference and the possible convening of an intergovernmental group of experts, to the eighth session of UNCTAD for appropriate action in the context of deliberations on items on its agenda, which encompasses the subject of technology.

Notes

a/ See "The relevance of recent developments in the area of technology to the negotiations on the draft international code of conduct on the transfer of technology" (TD/CODE TOT/55).

b/ See "Informal Expert Group Meeting on the Draft International Code of Conduct on the Transfer of Technology, 3-5 September 1990. Report by experts addressed to the Secretary-General of UNCTAD" (UNCTAD/ITP/TEC/Misc.11).

APPENDIX

Text under consideration at the end of the consultations

Terms of reference for an Intergovernmental Group of Experts on an International Code of Conduct on the Transfer of Technology

1. A fresh approach to the concept of a Code

- to review economic, technological and policy trends relevant to technology acquisition and transfer; and

- to formulate appropriate recommendations for consideration of a framework of principles and standards in the area of transfer of technology with a view to furthering economic development of all countries, in particular developing countries, taking fully into account recent policy shifts towards promotion of technology transfer and new emphasis on cooperation; this could be manifested by more specific promotional guidelines for intergovernmental and inter-enterprise cooperation on, inter alia, collaborative research and development schemes or programmes, joint ventures, and the promotion of technology transfer related investment and innovation in developing countries, including in new and emerging technologies.

- consider to what extent a Code should reflect the desirability of an open environment for the import and export of technology.

2. In doing so, experts, when referring to a Code,

- shall [adhere to]* [be directed by]** the principle of respect for the freedom of contract by parties to transfer of technology and free choice by parties of forum and applicable law;

- in reviewing and evaluating questions relating to RBPs, shall take into account the results of the recent review conference of the Set, a/ and refer to the likely effect on competition of the transaction in question as the [sole]* governing principle.

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* Language proposed by developed countries members of Group B in UNCTAD.

** Language proposed by developing countries members of the Group of 77 in UNCTAD.

3. The IGE shall build upon the negotiations and consultations on a draft international code of conduct on the transfer of technology (document TD/CODE TOT/47) and formulate recommendations for the resumption of negotiations.

Notes

a/ i.e., the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.